

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

**Petition to Establish Procedural Requirements
To Govern Proceedings for Forbearance Under
Section 10 of the Communications Act of 1934,
As Amended**

WC Docket No. 07-267

COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint Nextel"), in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding,¹ hereby respectfully submits its comments supporting the petition filed on September 19, 2007 by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeodUSA Telecommunications Services, Inc. (collectively the "Petitioners") asking the Commission to establish procedural rules to govern its consideration of forbearance petitions under section 10 of the Communications Act of 1934, as amended.²

I. PROCEDURAL RULES ARE NEEDED TO BRING STRUCTURE AND GUIDANCE TO THE FORBEARANCE PROCESS

Congress implemented the forbearance provisions as part of the Telecommunications Act of 1996 ("Act"). Section 10 authorizes the Commission to "forbear from applying any

¹ *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking (NPRM), WC Docket No. 07-267, FCC 07-202 (released November 30, 2007) (hereinafter "*Forbearance NPRM*"). The Commission opened this rulemaking in response to the CLEC petition to solicit public input on its forbearance processes. The NPRM called for the filing of initial comments 30 days after publication in the Federal Register, with reply comments due 45 days after publication. The notice was published in the Federal Register on February 6, 2008; thus, the initial comment deadline is March 7, 2008 and the reply comment deadline is March 24, 2008. See 73 Fed. Reg. 6888 (February 6, 2008).

² 47 U.S.C. § 160(c).

regulation or any provision of this chapter to a telecommunications carrier or telecommunications service” if it determines that three specific criteria have been satisfied.³ Congress enacted section 10 to give the Commission the means to eliminate obsolete and unnecessary regulations or statutory provisions without legislative intervention. Since its implementation, however, the statute has generated significant controversy, particularly as the major incumbent local exchange carriers (“ILECs”) have taken advantage of the forbearance process to seek deregulation from the core provisions of the Telecom Act.⁴ In particular, some Commissioners have taken issue with the conduct of particular forbearance proceedings and the adequacy of the decisions rendered.⁵ Similarly, some members of Congress have expressed concerns with the forbearance process and have introduced legislation in both the House and Senate to remove the “deemed granted” feature of the statute,⁶ which gives effect to forbearance requests if the Commission fails to act by the one-year, 90-day statutory deadline.⁷

³ 47 U.S.C. § 160(a).

⁴ See, e.g., *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed December 20, 2004) (“*Verizon Broadband Services Petition*”); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (filed September 6, 2006) (“*Verizon 6 MSA Petition*”); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Phoenix, Arizona, and Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97 (filed April 27, 2007) (“*Qwest 4-MSA Petition*”).

⁵ See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125, Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan Adelstein, Dissenting (released October 12, 2007); *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Joint Statement of Commissioner Michael J. Coops and Commissioner Jonathan Adelstein, Concurring in part, Dissenting in Part (released August 20, 2007).

⁶ Congressman Dingell introduced H.R. 3914 on October 22, 2007 while Senator Inouye introduced S. 2469 on December 13, 2007.

⁷ The Act provides that forbearance petitions are deemed granted if the Commission does not act within one year of filing. This period may be extended by an additional 90 days, putting in place a 15-month statutory time clock. 47 U.S.C. § 160(c).

Forbearance petitions have been deemed granted in a few instances since the statute took effect.⁸ This default provision had far-reaching and ill-considered effects in the case of Verizon's broadband services forbearance petition, leading to the elimination of important statutory and regulatory provisions applicable to its special access and enterprise services.⁹ In that case, the Commission issued a News Release the day after the statutory deadline passed reporting that the four-member Commission had deadlocked and Verizon's petition "was deemed granted by operation of law."¹⁰ As a result of the Commission's lack of consensus in this matter and the absence of a written decision ruling on the substance and merits of Verizon's forbearance claims, Verizon's competitors, as well as policymakers, are left to guess at the exact scope of the forbearance relief Verizon obtained in this proceeding while Verizon has free rein to interpret the granted relief to its best advantage.

In asking for comment on the general need for procedural rules,¹¹ the Commission acknowledged that the forbearance process may bring about unintended consequences.¹² The

⁸ See *Ameritech Request for Forbearance from the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Service Granted Through Operation of Law*, Public Notice, CC Docket No. 96-149 (released May 13, 1998); *SWBT Request for Forbearance From the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Services Granted Through Operation of Law*, Public Notice, CC Docket No. 96-149 (released June 4, 1998); *Verizon Telephone Companies' Petition for Forbearance From Title II and Computer Inquiry Rules With Respect to Their Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 04-440 (released March 20, 2006).

⁹ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed December 20, 2004) ("Verizon Broadband Services Petition").

¹⁰ *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 04-440 (released March 20, 2006). Notably, the Joint Statement from Chairman Martin and Commission Tate indicated that none of the commissioners supported granting Verizon's petition as filed, that they supported granting the petition as limited by Verizon's *ex parte* filings, and that the preferred course would have been to reach consensus on a proposal that clearly delineates the relief granted. *Id.*

¹¹ In particular, the Commission asked parties to comment on whether forbearance is an effective means for the Commission to make changes to its regulations and whether forbearance is being used for its intended purpose. *Forbearance NPRM* at ¶ 13.

¹² Specifically, the Commission asked for comment on the consequences of having to focus significant and finite resources to address the numerous forbearance petitions pending before it, often at the expense of other industry-wide rulemakings. It also noted the burden on stakeholders, including administrative and financial costs, from participating in forbearance proceedings and asked whether the statutory deadline dictating the completion of forbearance petitions places additional burdens on participants. Finally, the Commission asked for comment on the

Commission's *Forbearance NPRM* cogently summarizes the defects inherent in the forbearance review process. The 15-month statutory deadline associated with the forbearance process, coupled with the substantial increase in forbearance petitions that have been filed over the past several years, keep the Commission's time and resources continually focused on addressing forbearance petitions to the detriment of other policy initiatives. Similarly, stakeholders, including state commissions, consumer agencies, and competitive carriers, incur substantial financial and administrative burdens by having to repeatedly devote limited resources to participating in a constant stream of forbearance proceedings, especially as the ILECs capitalize on the statutory clock to prompt Commission action on a host of critical issues.¹³ Finally, the focus on forbearance petitions to enact sweeping regulatory changes permits the regulated industry to drive Commission policy and decision-making rather than the agency itself.

To date, the Commission has adopted only one procedural rule applicable to forbearance filings¹⁴ and has instead taken an *ad hoc* approach to addressing forbearance petitions. Accordingly, the Commission must act now to bring order and structure to forbearance proceedings by adopting detailed procedural rules to govern the review process.

II. PETITIONERS' PROPOSED RULES WOULD ENSURE A FULL AND INFORMED REVIEW OF FORBEARANCE PETITIONS

The Petitioners propose a number of specific rules that the Commission should impose, as well as a timeline for conducting its review of forbearance petitions. Sprint Nextel agrees that many of these procedural requirements would facilitate an informed review of these petitions and

effects having company-specific forbearance petitions drive agency decisions rather than the Commission deciding to take industry-wide actions. *Forbearance NPRM* at ¶ 13.

¹³ See, e.g., *In the Matter of Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption*, WC Docket No. 08-8 (filed January 11, 2008); *In the Matter of Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) From Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b), and Rule 69.5(b)*, WC Docket No. 07-256 (filed October 23, 2007).

¹⁴ *Adoption of Section 1.53 of the Commission's Rules*, Memorandum Opinion and Order, 15 FCC Rcd 1140 (2000). This rule requires forbearance requests to be filed as separate pleadings in certain cases.

allow for full participation by all interested parties. It therefore urges the Commission to adopt procedural rules to clearly delineate how it will address forbearance petitions and to bring some much-needed structure to the section 10 forbearance review process. Sprint Nextel comments on a few of the specific proposals in the following paragraphs.¹⁵

A. APA Notice and Comment Procedures

The Petitioners urge the Commission to apply the APA's notice and comment procedures to all section 10 forbearance petitions.¹⁶ The APA rules direct administrative agencies, including the Commission, to provide all interested persons with adequate notice of a proposed rule and a reasonable opportunity to comment.¹⁷ This approach ensures that the agency applies specific and consistent standards to arrive at reasoned decisions in rulemakings and adjudications, consistent with due process.¹⁸ Due process safeguards are just as necessary in reviewing forbearance petitions. The Petitioners point out that, while the Commission has typically allowed interested parties an opportunity to comment on forbearance petitions, the comment cycle has varied significantly from case to case¹⁹ and more importantly, there is nothing to compel the Commission to continue this practice in every instance. Thus, the Commission should act to

¹⁵ The particular rules the Petitioners enumerated can be generally condensed and summarized as follows: (i) a rule confirming that Administrative Procedures Act ("APA") notice-and-comment procedures apply to forbearance petitions; (ii) a rule clarifying that the petitioner seeking forbearance has the burden of proof; (iii) rules describing the format and content of forbearance petitions; (iv) rules governing protective orders and *ex parte* filings; (v) rules encouraging state commission input; and (vi) rules establishing a timetable for various filings made during the forbearance review process. CLECs' Petition at 11-33 and Attachments A and B.

¹⁶ CLECs' Petition at 11.

¹⁷ 5 U.S.C. § 553(c).

¹⁸ CLECs' Petition at 12.

¹⁹ For example, in the docket established to address Qwest's petition for forbearance from Title II and the *Computer Inquiry* rules applicable to its broadband services, which it withdrew just prior to the statutory deadline on September 11, 2007 and then immediately refiled on September 12, 2007, the Commission issued a Public Notice just one day after Qwest refiled establishing a 7-day comment cycle, with no provision for the filing of reply comments. See *Pleading Cycle Established for Comments in Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to Broadband Services*, Public Notice, WC Docket No. 06-125, DA 07-3923 (released September 13, 2007).

formalize this policy and implement a rule requiring these notice and comment procedures to be followed in all proceedings initiated to review forbearance petitions.

B. Burden of Proof

The Petitioners ask that the Commission adopt a rule that specifically states that the petitioning party bears the burden of proof in forbearance proceedings.²⁰ Section 10(a) of the Act provides that the Commission may not grant forbearance from any Commission regulation or statutory provision until it affirmatively determines that the three components of the statutory criteria are satisfied.²¹ The Commission should adopt a rule specifying that the petitioning party bears the burden to present evidence that satisfies each element of the statutory standard and that forbearance will be denied if it determines that any one of the elements is not met.²²

C. Format and Content of Forbearance Petitions

The Petitioners propose a number of rules that address the form and content of forbearance petitions. First, the Petitioners propose a “complete-as-filed” rule, which would require the party seeking forbearance to include in its initial filing all of the evidence upon which it would have the Commission rely in evaluating its petition against the statutory criteria enumerated above. The petitioning party could not materially supplement its petition without restarting the statutory timeline.²³

²⁰ *Id.* at 12-13.

²¹ Specifically, the Commission must determine that enforcement of the regulation or statutory provision (1) is not necessary to ensure that the telecommunications carrier’s charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) is not necessary for the protection of consumers; and (3) is consistent with the public interest. 47 U.S.C. § 160(a). Section 10(b) also requires the Commission, as part of its public interest determination, to examine whether forbearance from enforcing the provision or regulation at issue will promote competitive market conditions and enhance competition among telecommunications providers. 47 U.S.C. § 160(b).

²² *Cellular Telecommunications & Internet Association v. Federal Communications Comm’n*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three elements of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong).

²³ CLECs’ Petition at 13.

Sprint Nextel agrees that a “complete-as-filed” requirement is needed to ensure that forbearance proceedings are conducted in a fair manner that provides interested parties with a meaningful opportunity to express their views. The Commission took this approach when the Bell Operating Companies (“BOCs”) began filing applications seeking authority to provide in-region interLATA service under section 271 of the Act. After reviewing several deficient 271 petitions requiring numerous evidentiary supplements, the Commission required the BOCs to submit with their initial applications all of the factual evidence upon which the Commission should rely in making its findings.²⁴ A similar requirement in the forbearance context would deter the practice employed in previous forbearance cases of filing incomplete forbearance applications lacking evidentiary support with the expectation of filing supplemental information, often long after the comment cycle has concluded.²⁵ This approach leaves interested parties at a distinct disadvantage in commenting on the forbearance request when the data supposedly supporting the relief is continually being changed or updated.²⁶

Additionally, the Petitioners recommend that the Commission enumerate the requirements to make a *prima facie* case for forbearance.²⁷ Sprint Nextel agrees that clearly defining these elements would facilitate the Commission’s review of forbearance petitions for compliance with the statute and enable reasoned decision-making.

D. Ex Parte Submissions

Sprint Nextel agrees with the Petitioners that the Commission should bring structure and discipline to *ex parte* submissions in the forbearance context.²⁸ Under the current practice, there

²⁴ *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd 6923, 6925 (March 23, 2001).

²⁵ CLECs’ Petition at 13-17.

²⁶ The Commission recognized in the section 271 context that a record that is continually evolving is highly disruptive to the review process. Section 271 Public Notice, 16 FCC Rcd at 6925.

²⁷ CLECs’ Petition at 17-18.

²⁸ CLECs’ petition at 28-29.

is no time limit on when a petitioning party can submit crucial evidence supporting its claim in the form of an *ex parte* filing, which often comes within days of the statutory deadline within which the Commission must take action on the petition.²⁹ This process significantly hampers a fully informed critique of the newly added data by both the Commission and interested parties. The Petitioners therefore propose that the Commission adopt a rule that prohibits the petitioning party from filing a substantive written *ex parte* within 30 days of the initial statutory deadline unless the Commission specifically requests the information.³⁰ The Petitioners also set forth additional timelines to govern *ex parte* submissions by interested parties and any responsive filings by the petitioning parties.³¹ Sprint Nextel supports the proposed *ex parte* timetable the Petitioners have outlined and recommends that the Commission implement it.

E. Timetable for Reviewing Forbearance Petitions

The Petitioners ask the Commission to establish a specific timetable that would govern the disposition of forbearance petitions. In particular, the Petitioners propose that the timeline should contain a short, initial time period in which the petitioning party could correct minor deficiencies in its petition without restarting the statutory clock, as well as a definitive time frame for the Commission to address any motions filed to dismiss the forbearance request.³² They also suggest that the Commission establish a standard comment cycle for all section 10 forbearance petitions, which would only begin once the Commission finalized its initial review of the petition to detect any procedural defects, issued a protective order, ruled on any motions to dismiss, and obtained state commission input. Upon completion of these activities, the comment

²⁹ *Id.*

³⁰ *Id.* at 28.

³¹ *Id.*

³² CLECs' Petition at 24, 26-27. The Petitioners propose that the Commission review the initial filing within twenty-one days of submission. If the Commission's review uncovers procedural defects with the petition, it will afford the petitioning party fourteen days to remedy those defects. If the petitioning party fails to make satisfactory corrections, the Commission would reject the petition without prejudice. *Id.* at 24.

cycle would start, giving interested parties 45 days to file comments, with reply comments due 30 days after the initial comment deadline.³³ A standard comment cycle would establish consistent parameters for addressing forbearance petitions. Moreover, having the comment cycle begin well after the protective order is issued ensures that interested parties have a sufficient opportunity to access and conduct a meaningful review of the confidential materials upon which the petitioning party relies to support its forbearance claim.

Sprint Nextel agrees that adopting a timeline that details each step in the Commission's forbearance review, including a requirement to issue a written order in accordance with the Act,³⁴ would bring more certainty and specificity to the process. It urges the Commission to implement this framework by adopting the timetable that the petitioners propose.

III. CONCLUSION

For the foregoing reasons, Sprint Nextel urges the Commission to adopt the proposed procedural rules to govern the conduct of forbearance proceedings.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Jennifer A. Duane

Anna M. Gomez
Jennifer A. Duane
2001 Edmund Halley Drive
Building A, 2nd Floor
Mailstop: VARESP0201-A208
Reston, VA 20191
703-592-7781

Dated: March 7, 2008

³³ *Id.* at 27.

³⁴ Section 10(c) directs the Commission to explain its decision to grant or deny a petition in writing. 47 U.S.C. § 10(c).